No. 584

In the Supreme Court of the United States

OCTOBER TERM, ~~1950~~ 51

THE UNITED STATES, PETITIONER

v.

MARTIN WUNDERLICH, ANN M. WUNDERLICH, MARIE WUNDERLICH, E. MURIELLE WUNDERLICH AND THEODORE WUNDERLICH, A PARTNERSHIP, TRADING UNDER THE NAME OF MARTIN WUNDERLICH COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

INDEX

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled case on June 5, 1950.

OPINION BELOW

The opinion of the Court of Claims (R. 159-170) is reported at 117 C. Cls. 92.

JURISDICTION

The judgment of the Court of Claims was entered on June 5, 1950 (R. 170). A motion for a

new trial, filed on August 14, 1950 was denied on October 2, 1950 (R. 171). By an order of the Chief Justice, dated December 26, 1950, the time for filing a petition for a writ of certiorari was extended to and including March 1, 1951 (R.). The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTIONS PRESENTED

Article 15 of the standard form government construction contract provides that a department head's decision on "all disputes concerning questions of fact arising under this contract * * * shall be final and conclusive upon the parties thereto." In this case the Court of Claims has held that the determination of an "equitable adjustment" for work performed pursuant to a change order under the contract is a question of law not embraced within Article 15, and it has set aside such a determination even though (a) the contractor did not allege, and the court did not find, fraud or such gross error as necessarily implies bad faith; (b) there was no evidence of bias, prejudice, haste, arbitrariness or caprice in the department head's decision; and (c) it was supported by ample evidence and by administrative experience with comparable contractual problems.

The questions presented are:

1. Whether the holding that the determination of an "equitable adjustment" is a question of law

conflicts with *United States* v. *Callahan Walker Co.*, 317 U.S. 56.

2. Whether the failure of the Court of Claims to accord finality to department heads' decisions in cases of this character is in conflict with the governing principles of judicial review recently reiterated in *United States* v. *Moorman*, 338 U.S. 457.

CONTRACT PROVISIONS INVOLVED

Pertinent portions of the contract and specifications are set forth in the Appendix, *infra*, pp. 25-27.

STATEMENT

This litigation grows out of the performance of a contract for the building of a dam by respondent [1] for the Government. The contract work, for which notice to proceed was given on April 18, 1938, was satisfactorily completed in October, 1941, and respondent has been paid a total of $2,220,965.30 therefor (R. 67). In accepting final payment, respondent reserved 43 claims for additional sums (R. 76). Some of these were subsequently abandoned, some were resolved in respondent's favor by the contracting officer whose decision on all of the claims was affirmed by the Secretary of the Interior acting through his First Assistant (R. 76-77).

In this suit respondent re-asserted 21 of the

[1] The several respondents, who trade as the "Martin Wunderlich Company," are collectively referred to herein as "respondent."

claims which had been administratively decided. Four of these (on which respondent was satisfied with the administrative ruling but payment had not yet been made) were not contested by the Government, six were allowed by the Court of Claims, and eleven were either abandoned or denied (R. 77, 160, 166-170). Total recovery on the six contested claims granted by the court was $164,760.83, of which $155,748.44 was allowed on the single claim referred to in this litigation as Claim No. 17 (R. 170, 169). It is to the decision on this single claim that this petition is directed.

Claim No. 17 arose because, in an equitable adjustment in the contract price made by the contracting officer and approved by the department head for work performed pursuant to a change order, respondent was awarded a sum smaller than it claimed. The dispute centers on the amount respondent was awarded for the use and maintenance of its equipment in excavating, separating, and hauling earth and cobbles under the change order. While the facts bearing immediately upon the disputed determination are thus relatively limited, they are best understood against a background of developments in the contract work which led to the controversy.

a. *Events leading to the order for changes and equitable adjustment.*—The dam embankment, the main feature of the contract work, was to consist of earth fill of varying degrees of coarseness,

cobbles, and other materials (R. 67-68).[2] To the extent that the materials required for the embankment proved to be unavailable from excavations for required structures, they were to be obtained "from borrow pits as directed by the contracting officer" (R. 54).

Under Item 14 of the contract unit price schedule, the contractor was to be paid at the rate of 23 cents per cubic yard for common excavation in earth borrow pits and transportation to the embankment of materials so excavated (R. 31). Item 16 of the schedule provided for payment at 35 cents per cubic yard for excavation from cobble borrow pits, separation, and transportation to the embankment of cobble-fill materials (R. 31).

The contract drawings showed two earth borrow pit areas, the work in one of which, borrow pit No. 2, gives rise to the claim involved here.[3] In 1938, after respondent had excavated some earth fill from the top stratum of borrow pit No. 2, the underlying materials were found to contain a large quantity of cobbles exceeding five inches in diameter. About November 1, 1939, respondent was ordered to obtain from this pit additional

[2] The cobble-fill portions of the embankment were to consist of cobbles over 2½ inches in diameter (R. 61). The earth-fill portions were to consist of a mixture of clay, sand, and gravel and were to contain no stones having maximum dimensions greater than five inches. Stones over five inches in size were to be removed by the respondent from otherwise approved earth-fill materials (R. 58, 59).

[3] The drawings also showed a cobble borrow pit but, for reasons which appear below (p. 6), this was never used as a source of material for cobble fill (R. 113).

coarse materials which were then needed for the earth-fill portion of the embankment (R. 114). Respondent objected to performing this work as common excavation at 23 cents per cubic yard under pay item 14, contending that the large amount of oversized cobbles requiring separation warranted payment at 35 cents under item 16 (R. 115). On December 11, 1939, it signed under protest a pay voucher including 79,847 cubic yards excavated from borrow pit No. 2, during 1939, for payment under item 14 (R. 115).

Following extended but fruitless negotiations, in the course of which respondent rejected an offer by the contracting officer to reclassify a portion of borrow pit No. 2 as a cobble borrow pit (R. 115-120), a mandatory order for changes, Order No. 3, dated August 31, 1940, was issued pursuant to Article 3 of the contract (Appendix, *infra*, p. 25). This order directed respondent, in lieu of obtaining cobbles from the cobble borrow pit area (see note , *supra*), to use the cobbles separated from materials excavated in the earth borrow pit areas and to submit within a specified period any claim for an adjustment in the contract price based upon the change (R. 120-121).

b. *Respondent's claim and the disputed administrative decision.*—On December 28, 1940, respondent filed a claim for $334,994.42 for the work in borrow pit No. 2 (R. 121). In this claim, which was subsequently increased twice (R. 121,

125), respondent sought payment at the rate of 35 cents per cubic yard, under item 16 of the contract schedule, for the 79,847 cubic yards of materials excavated from borrow pit No. 2 during 1939 (*supra*, p. 6). For the excavation in borrow pit No. 2 during 1940, respondent claimed its cost of performance plus 10% for superintendence, general expense and profit, following the formula provided by paragraph 10 of the contract specifications (Appendix, *infra*, p. 26) for "extra work * * * not covered by the specifications or included in the schedule * * *" (R. 10).

On June 16, 1941, the contracting officer replied to the claim, pointing out that there was no order directing payment for operations in borrow pit No. 2 during 1940 on the basis of cost plus 10% but finding that an adjustment on this basis would be equitable in the circumstances (R. 122). With exceptions now immaterial, the contracting officer found that respondent's figures for hours of labor and rates of pay, for hours of use of equipment, and for cost of materials were correct (R. 121). He went on to find, however, that the rates submitted for use and maintenance of equipment were excessive, and allowed for this item an amount considerably smaller than respondent claimed (R. 122). This latter determination, the main subject of the claim here, involves two disputed factors: (1) a rental allowance for respondent's equipment used during 1940 in borrow

pit No. 2, and (2) an allowance for field repairs and maintenance of this equipment.

Both respondent and the contracting officer used an ownership rental schedule published by the Bureau of Reclamation in deriving the divergent rental rates each asserted to be proper (R. 125). This schedule, based upon a similar schedule published by the Associated General Contractors of America (Pltf. Ex. 17-B), lists annual rental rates for various items of construction equipment (R. 125). Dividing the annual rental rate for each item of equipment by the number of hours in an eight-month working season, at two eight-hour shifts for 30 days each month, the contracting officer arrived at the hourly rate used in his determination. He then multiplied this rate by the number of hours respondent showed as hours of operation in borrow pit No. 2 during 1940 to arrive at the rental allowances for the equipment. He made no additional allowance for idle time (R. 127).

For the maintenance and repair rates which respondent had submitted and which he held to be excessive, the contracting officer substituted rates derived from Bureau of Reclamation experience on other projects, from work by government forces, and from experiences and practices of the Forestry Service, Bureau of Public Roads, Tennessee Valley Authority, and Colorado State Highway Department (R. 129; Deft. Ex. 17-V, p. 2).

Basing his award for use of respondent's equipment on rental and maintenance allowances computed in the manner just described, the contracting officer concluded that respondent was entitled to an equitable adjustment of $40,400.15, in addition to the $194,784.93 already paid, for the excavation in borrow pit No. 2 during 1940 (Pltf. Ex. C, p. 48). Applied to the yardage excavated in 1940, this represented a rate of $0.0477 per cubic yard in additional compensation which the contracting officer then allowed for the 79,847 cubic yards excavated in borrow pit No. 2 during 1939 (*Id.* p. 50; R. 122). Adding the $3,808.70 so determined, the contracting officer awarded respondent a total of $44,208.85 in his decision of December 29, 1942 (R. 122, 125). On respondent's appeal to the Secretary of Interior, this decision was affirmed (R. 125).

c. *The decision of the Court of Claims.*—Refusing to accept the award determined by the Secretary of Interior as equitable, respondent sought recovery in the present suit of $181,721.10 in additional compensation for the work performed during 1939 and 1940 in borrow pit No. 2 (R. 9-10).

Addressing itself generally to the contested claims before it (which include, of course, the claim under consideration here), the Court of Claims concluded that these claims involved interpretation of the contract and were, therefore, questions of law rather than of fact (R. 162-166). As

questions of law, the court declared, they were beyond the purview of Article 15 of the contract in which the parties had agreed to accept as final the department head's decision on "all disputes concerning questions of fact * * *." Accordingly, the court proceeded to "consider the [respondent's] claims upon their merits" (R. 166).

As to Claim No. 17, the claim involved here, the court held that the administrative decision was erroneous in the amounts awarded both as rental allowances and as allowances for maintenance and repair. The annual rental allowances in the Bureau of Reclamation Schedule, the court pointed out, were designed to include reimbursement for idle time (due to weather, repairs, etc.) as well as for hours of actual operation during the working season. By reducing these annual rates to hourly rates and applying these only to hours of actual operation on the work involved in this claim, the contracting officer had used, the court said, a "completely unrealistic and unfair" formula (R. 168). Applying a formula which made allowance for idle time, the court concluded that proper rental rates would total some $30,000 more than the contracting officer had allowed (R. 129). In an order dated June 27, 1950, the court, on respondent's motion, amended its findings promulgated on June 5, 1950, to state that the contracting officer's method of computing rental rates was "arbitrary and capricious, and the result arrived

at by that method was grossly erroneous" (R. 170-171).

The allowances awarded by the Secretary of Interior for field repairs and maintenance were also held by the Court of Claims to be "arbitrary and capricious" (R. 168-169). The court held that respondent's figures on its actual costs had been improperly discarded and that arbitrary hourly figures had been substituted in their stead (R. 168). In its order of June 27, 1950, the court amended its findings to add the statement that the "method of computation of [respondent's] costs for the repair and maintenance of its equipment, used by the contracting officer and the head of the department, was arbitrary and capricious, and the result arrived at by that method was grossly erroneous" (R. 171).

Using amounts it determined to be correct for rental and maintenance allowances, the Court of Claims awarded respondent $146,166.80, in lieu of the $40,400.15 allowed by the department head, as additional compensation for the work in borrow pit No. 2 during 1940 (R. 132). While this award amounted to 17 cents per cubic yard; the court concluded that respondent was entitled to 12 cents per cubic yard for the 79,847 cubic yards excavated in 1939, or $9,581.64 rather than the $3,808.70 deemed equitable by the Secretary of Interior (R. 132). Instead of the administrative adjustment of $44,208.85 which had been rejected, re-

spondent was thus allowed a total of $155,748.44 by the judgment of the court below (R. 132, 169).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that the determination of an "equitable adjustment" for work performed pursuant to a change order under Article 3 of the contract was a question of law rather than a question of fact.

2. In failing to hold, in accordance with *United States* v. *Callahan Walker Co.*, 317 U. S. 56, that the provision for final administrative settlement of disputes concerning questions of fact in Article 15 of the contract was applicable to the dispute involved in Claim No. 17 over an equitable adjustment for work performed pursuant to a change order under Article 3.

3. In setting aside the decision of the department head, without finding that the decision was fraudulent or so grossly erroneous as necessarily to imply bad faith, despite the contractor's agreement in Article 15 of the contract to accept decisions "concerning questions of fact" as "final and conclusive."

4. In setting aside the decision of the department head despite the fact that the plaintiff made no allegation of fraud or of such gross error as necessarily to imply bad faith.

5. In holding that the department head's rulings on Claim No. 17 were "arbitrary and capricious"

and "grossly erroneous" despite the facts that (a) there was no evidence of bias, prejudice, haste, or caprice in the administrative determination; (b) there was evidence to support the administrative determination; and (c) the standards guiding the administrative decision were relevant, intelligible, and reasonable.

6. In giving judgment for the plaintiff for $155,748.44 in lieu of the administrative award of $44,208.45.

REASONS FOR GRANTING THE WRIT

In so far as it rests upon the holding that the determination of an "equitable adjustment" constitutes a question of law and is therefore not entitled to the finality accorded by Article 15 to administrative resolution of "disputes concerning questions of fact," the decision of the Court of Claims is in square conflict with *United States* v. *Callahan Walker Co.*, 317 U. S. 56. In so far as the court's characterization of the administrative determination as "arbitrary and capricious" and "grossly erroneous" means that such determination may be set aside even if it concerns questions of fact, the holding is, we submit, a plain misapplication of the settled rule that decisions under Article 15, "in the absence of fraud or of mistake so gross as to necessarily imply bad faith, * * * will not be subjected to the revisory power of the courts." *United States* v. *Gleason*, 175 U. S. 588, 602; *United States* v. *Moorman*, 338 U. S. 457, 460.

462.[4] Both of these errors reflect what we have heretofore described as a continued "tendency in the Court of Claims to whittle away the authority of designated officers of the United States to make final decisions under contracts." See *United States* v. *Moorman, supra,* at 460n.

In an effort to avoid expensive and time-consuming litigation of technical factual disputes, the Government bargains and pays for inclusion of Article 15 in its standard construction contracts. But Article 15, the binding scope of which has been made clear to the parties by numerous decisions of this Court, is largely nullified if courts (1) erroneously characterize factual questions as questions of law or (2) stigmatize honest and rational administrative determinations with which they disagree as "so grossly erroneous as to imply bad faith." We submit that the first of these errors, in plain disregard of this Court's decision in *United States* v. *Callahan Walker Co., supra,* is the primary basis of the decision below and that the second vitiates the alternative ground suggested in the court's amended findings and opinion.

The continuing importance of provisions in government contracts for final administrative resolution of disputes, reflected in this Court's numerous decisions correcting judgments of the court below

[4] Among the numerous decisions to the same effect are *Kihlberg* v. *United States,* 97 U. S. 398; *Martinsburg & Potomac R. R. Co.* v. *March,* 114 U. S. 549; *Plumley* v. *United States,* 226 U. S. 545; *Merrill-Ruckgaber Co.* v. *United States,* 241 U. S. 387.

which have sought to narrow the effectiveness of such provisions,[5] is particularly great today when the Government's contractual activities are a significant item in a huge national budget. The departure from settled principles in the instant case, coupled with this Court's affirmance by an equal division (340 U. S. 898) of *Penner Installation Corp.* v. *United States*, 114 C. Cls. 571 and 116 C. Cls. 550, substitutes doubt for the certainty which alone can prevent the litigation the Government seeks to escape through Article 15. We urge, therefore, that this case presents an appropriate occasion for reaffirmation and particularization of the applicable rules.

1. In *United States* v. *Callahan Walker Co.*, 317 U. S. 56, this Court held, reversing the Court of Claims, that a dispute over the amount of an equitable adjustment for construction of a false berm under an Article 3 change order posed "inquiries of fact" and that the provisions of Article 15 were applicable. In *Callahan Walker* the work performed pursuant to the change order involved the digging, moving, and placing of earth. In the present case the work consisted of excavating, separating, and hauling a mixture of earth materials and stones. Obviously, these differences in

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[5] *E.g.*, *United States* v. *McShain*, 308 U. S. 512, 520; *United States* v. *Callahan Walker Co.*, *supra*; *United States* v. *Blair*, 321 U. S. 730; *United States* v. *Bentlas*, 324 U. S. 768; *United States* v. *Holpuch Co.*, 328 U. S. 234; *United States* v. *Moorman*, *supra*.

job details provide no basis for distinguishing the cases.

Nor can the rule of *Callahan Walker*, wholly ignored in the opinion below, be escaped by the court's apparent belief that paragraph 10 of the contract specifications, rather than Article 3, is the contract provision governing the equitable adjustment involved here.[6] It should be noted that the order for changes in this case was expressly and properly issued pursuant to Article 3 as a change "in the drawings and/or specifications" of the contract—namely, a change in the designated source of cobbles for the embankment (R. 120). Paragraph 10 of the specifications, on the other hand, deals with "extra work * * * not covered by the specifications or included in the schedule" (R. 34), and would seem to be irrelevant to the work involved here which was both "covered by the specifications" and "included in the schedule."[7] Even accepting, however, the er-

[6] In determining the equitable adjustment, the contracting officer and the department head concluded that cost plus ten percent, the basis on which respondent submitted its claim and the basis on which paragraph 10 of the contract specifications happens to provide for extra compensation, would constitute an equitable basis for settlement of the claim for 1940 excavation (R. 122, 34-35). It may be that the court below was misled by this fact to its conclusion that paragraph 10 was the contract provision under which the work in question was ordered.

[7] Paragraph 52 of the specifications (R. 54) provided that all materials for the embankment which were not available from required excavations were to be taken from borrow pits as directed by the contracting officer. That officer was to direct the location and extent of borrow pits and the Government reserved the right to change or add locations.

roneous assumption that paragraph 10 is applicable here, there is nothing in this paragraph to suggest even remotely that the kind of dispute considered in *Callahan Walker* should be deemed, when it arose under this contract, to involve questions of law outside Article 15. Instead, paragraph 10 provides for the determination of cost "by the contracting officer." A dispute as to the correctness of such a determination is, under the decision in *Callahan Walker* a dispute "concerning questions of fact" the final resolution of which, in the absence of fraud or such gross error as necessarily implies bad faith, is committed to the official designated in Article 15 of the contract.

2. After it had considered respondent's claims "upon their merits" and promulgated its findings and opinion on June 5, 1950 (R. 66), the court below, on respondent's motion, added to its findings statements that the administrative calculation of the equitable adjustment due respondent was "arbitrary and capricious, and the result arrived at by that method was grossly erroneous" (R. 170-171). Coupled with comparable language in the

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Paragraph 55 (R. 58) required the contractor to remove stones with dimensions greater than five inches in otherwise approved earth materials and to place such stones in the cobble-fill portion of the embankment at the direction of the contracting officer.

Throughout this dispute, there has been disagreement as to whether the work in borrow pit No. 2 should have been classified for payment under item 14 of the schedule, under item 16, or partly under each. Whichever classification would have been correct, it is clear that the work was "included in the schedule."

court's opinion (see R. 168-169), these findings appear to mean that the decision of the department head in this case, even if viewed as involving questions of fact, was so erroneous that it could be set aside despite the finality with which the parties had endowed it in Article 15 of the contract. We submit that such an attempted justification, far from supporting the decision below, adds weighty reasons for review and reversal by this Court.

a. The rule that administrative determinations such as those provided for by Article 15 may be set aside by the courts "only * * * upon allegation and proof of bad faith, or of mistake or negligence so great, so gross, as to justify an inference of bad faith" (*United States* v. *Gleason, supra,* at 607) has "never been departed from by this Court." *United States* v. *Moorman, supra,* at 461. The stringent limitations on judicial review which these decisions express have been strictly enforced by this Court. Mere mistake on the part of the official designated by the contract as final arbiter is insufficient to warrant revision of his ruling. *Martinsburg & Potomac R. R. Co.* v. *March,* 114 U. S. 549, 553-554. Nor is "gross mistake" enough. *Ibid.*; *Ripley* v. *United States,* 222 U. S. 144. For the agreement of the parties to be bound by the department head's decision is meaningless if construed to be effective only when the reviewing court agrees with the decision. Article 15 is not imposed unilaterally on government contractors. It embodies

a deliberate bargain voluntarily entered into by both parties that the department head's decision is "final and conclusive upon the parties," if made honestly and in good faith, and is not to be the subject of court litigation. Like every other provision of a government contract, it is an element which doubtless affects the contract price.

In this case, respondent did not even allege in his petition to the court below (R. 1-19) that the department head's decision was fraudulent or made in bad faith or so grossly erroneous as necessarily to imply bad faith. Accordingly, the suit was tried, and apparently decided initially, on no such theory. Proofs were not directed to the single material question—whether, in the light of the evidence before him, the department head had reached a decision so unfair as to lead to an inference of bad faith. Instead, the court below has determined *de novo* the amount of the equitable adjustment to which it considered respondent entitled. As we have pointed out, the court's findings of "arbitrariness," "capriciousness," and "gross error," absent from the findings as originally promulgated on June 5, 1950, were only added as amendments on June 27, 1950—a fact which strongly suggests that the decision was not predicated upon recognition of the crucial necessity for findings of this character. And even the added findings fall short of the test laid down by this Court, for there is no statement or suggestion

by the court below that the "gross error" it attributes to the Secretary of Interior warrants an inference of bad faith.[8]

We submit, in short, that the Court of Claims, considering the determination of an equitable adjustment a question of law, may not have intended to hold that the determination in this case was so grossly erroneous that it could be set aside even if it was governed by Article 15. If this is so, the judgment should be reversed on the authority of *United States* v. *Callahan Walker Co., supra.* If, on the other hand, the court intended to rule on the Article 15 problem, we believe that the pleadings and the findings are on their face insufficient to sustain the holding.

b. Going beyond the pleadings and findings, we have brought to this Court all of the trial record bearing on the claim under consideration here to show that there could be no justification for a finding, assuming the Court of Claims has made it, of the kind of gross error implying bad faith which would warrant revision of the ruling made final by Article 15. The record is devoid of any suggestion of bias, haste, or bad will.[9] It shows, on the

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[8] Where the Court of Claims has explicitly and intentionally concluded that a department head's ruling was so grossly erroneous as to imply bad faith and destroy the finality contracted for in Article 15, it has expressed this finding in so many words. See the finding added to *Penner Installation Corp.* v. *United States*, 116 C. Cls. 550, 568, affirmed by an equally divided Court, 340 U. S. 898.

[9] The Court of Claims found (R. 69) that relations between respondent's employees and the Government's field force were "at all times cordial and cooperative."

contrary, that respondent's claims were considered dispassionately, intelligently, at length, and in painstaking detail.

The court below, using what it describes as "proper accounting methods" (R. 168) which allow for idle time, has awarded an amount substantially higher than that approved by the Secretary of Interior as a rental allowance for respondent's equipment used in borrow pit No. 2 during 1940. But the court itself has made the basic error of applying the equipment rental schedule promulgated by the Bureau of Reclamation as an inflexible tariff rather than a guide to be adapted to the circumstances of the given case.[10] As a result, the court has overlooked the fact, stressed by the contracting officer and the department head (Deft. Ex. 17-V, p. 1; Pltf. Ex. E, p. 15), that the work in borrow pit No. 2 was only one item under the contract and that respondent's equipment was used continuously on some part of the project. For the other operations being performed simultaneously, respondent was being paid at unit rates which presumably reimbursed it for rental of its equipment including idle time. Respondent submitted its equipment rental claim for the work in borrow pit No. 2 simply on the basis of actual hours

[10] Accompanying the equipment rental schedule published by the Associated General Contractors of America, Inc., upon which the Bureau of Reclamation schedule is based, is the cautionary observation that "the rates are not determinable by any precise method of accounting and should always be applied in the light of personal experience." Pltf. Ex. 17-B, p. 1.

of operation (Pltf. Ex. 17-A, p. 1). In paying only for these hours, the responsible officials avoided possible duplication of payments respondent was receiving under other items of the contract.[11] In any event, the obligation of the Secretary of Interior to make an "equitable adjustment" was not an obligation to employ any fixed set of rates. The fact that he adapted a standard rate guide to the special circumstances of this case is no warrant for the conclusion that his determination was "completely unrealistic and unfair."

Similarly, in computing allowances for field repairs and maintenance, the Secretary of Interior approved criteria and data which repel the inference of fraud or such gross error as implied bad faith. The respondent's figures were rejected as excessive. In their stead, rates were applied which had been gleaned from experience with similar equipment on other projects. (Deft. Ex. 17-V, p. 2). The department head's written decision noted that respondent had offered "no proof that such rates are unfair in this instance" (Pltf. Ex. E, p. 15). The Secretary of Interior, particularly

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[11] The equipment rental rates used in both the administrative determination and in the decision below are designed to include "interest on invested capital, depreciation, insurance, taxes, storage, major repairs, general overhauling and painting and equipment overhead" (R. 125-126). Since there is no showing that respondent used equipment not already on the job for the work in borrow pit No. 2, the allowance by the court below of an additional sum for idle time attributable to this work may well have resulted in double payment for such factors as interest, depreciation, insurance, taxes, and storage.

in view of the technical knowledge at his disposal, had at least as much right as a jury would have in a comparable situation to reject respondent's figures as inaccurate or so unjustifiably high that they could not be deemed "equitable."[12] And the propriety of his judgment is not diminished by the refusal of the court below to believe that maintenance and repair costs could be substantially the same for a $205 jack hammer as for a $20,000 t: ack (R. 168). Everyday experience contradicts the notion, which the court below seemed to regard as axiomatic, that annual costs for minor repairs and maintenance of construction equipment necessarily vary directly with the purchase price of each item.

It is not the purpose of this petition to show that the department head's decision was "correct" or that the court below was "wrong" in estimating the equitable adjustment to which respondent was entitled. We have sought merely to suggest what we believe is amply clear from the record—that the administrative determination in this case was reasoned, plausible, and wholly devoid of the kind

[12] While a government engineer so testified before the Commissioner (Tr. 1710), neither the contracting officer nor the department head in his written decision suggested the possible explanation that respondent's excessive maintenance rates might have resulted from improper inclusion of cost of major repairs. But whether this hypothesis occurred to them or not and whether it was correct or not, the important point is that, on the basis of technical advice of which the good faith has not been impugned, the department head found respondent's figures excessive. It would seem, therefore, that the stress in the opinion below (R. 168) on the absence of evidence that major repairs were made is immaterial.

of egregious blunder which could warrant judici
revision on the ground of such gross error as
imply bad faith.

CONCLUSION

For the foregoing reasons, it is respectfully su
mitted that this petition should be granted.

PHILIP B. PERLMAN,
Solicitor General.

FEBRUARY 1951.

Article 3 of the contract provides:

Changes.—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided, however,* That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Article 15 of the contract provides:

Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

Paragraph 10 of the specifications provides:

Extras.—The contractor shall, when ordered in writing by the contracting officer, perform extra work and furnish extra material, not covered by the specifications or included in the schedule, but forming an inseparable part of the work contracted for. Extra work and material will ordinarily be paid for at a lump-sum or unit price agreed upon by the contractor and the contracting officer and stated in the order. Whenever in the judgment of the contracting officer it is impracticable because the nature of the work or for any other reason to fix the price in the order, the extra work and material shall be paid for at actual necessary cost as determined by the contracting officer, plus 10 percent for superintendence, general expense, and profit. The actual necessary cost will include all expenditures for material, labor (including compensation insurance), and supplies furnished by the con-

tractor, and a reasonable allowance for the use of his plant and equipment, where required, to be agreed upon in writing before the work is begun, but will in no case include any allowance for office expenses, general superintendence, or other general expenses.

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